Dato' Ahmad Johari bin Tun Abdul Razak v A Santamil Selvi a/p Alau Malay @ Anna Malay (administratix for the estate of Balasubramaniam a/l Perumal, deceased) & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-237–02 OF 2018, W-02(IM)(NCVC)-286–02 OF 2018, W-02(IM)(NCVC)-287–02 OF 2018, W-02(IM)(NCVC)-288–02 OF 2018, W-02(IM)(NCVC)-289–02 OF 2018 AND W-02(IM)(NCVC)-348–02 OF 2018

TENGKU MAIMUN, SURAYA OTHMAN, STEPHEN CHUNG JJCA

28 MAY 2020

Civil Procedure — Appeal — Adducing fresh evidence — Application to adduce new evidence at appeal against dismissal of striking out application — Whether new evidence could not have been obtained with reasonable diligence for use at trial — Whether new evidence had important influence on results of case — Whether new evidence material, relevant or probative to determination of appeals — Whether delay in filing notices of motion explained by appellants — Courts of Judicature Act 1964 s 69(2) — Rules of Court of Appeal 1994 r 7

Civil Procedure — Striking out — Appeal against order dismissing striking out — Plaintiff brought action against defendant grounded on tort of conspiracy to injure — High Court dismissed defendants' application to strike out plaintiffs' writ and statement of claim — Whether claim ought to be struck out — Whether doctrine of res judicata applied — Whether claim barred by limitation pursuant to s 6(1)(a) of Limitation Act 1953 — Rules of Court 2012 O 18 r 19

The appellants ('the defendants') herein were appealing against the decision of the learned High Court judge in dismissing the appellants' striking out applications under O 18 r 19 of the Rules of Court 2012 ('the ROC'). The first respondent ('the first plaintiff') was the wife and the administratrix of the estate of Balasubramaniam a/l Perumal ('the deceased'), a registered private investigator engaged by one of the accused in the Altantuya murder trial, Abdul Razak Baginda, to provide protection services in respect of the alleged harassment Abdul Razak Baginda and his family received from Altantuya. The deceased passed away on 15 March 2015. The plaintiffs filed a suit against the defendants ('the first suit') on behalf of and for the benefit of the estate of the deceased for the harm and injury suffered by the deceased. The cause of action was grounded on the tort of conspiracy to injure wherein the plaintiffs alleged that the defendants, by unlawful means, acting individually and/or in concert with each other, had caused damage to the plaintiffs and the deceased, in that

the defendants had intentionally evicted or removed, thereby uprooted the plaintiffs and the deceased from Malaysia, whereby they were put to loss and expense and mental anguish. The defendants then filed O 18 r 19 of the ROC applications to strike out the first suit and these applications were allowed on the ground that the first plaintiff had no locus standi to institute the suit since she had not extracted the letters of administration and had failed to plead that there was an agreement between the eighth defendant and the other defendants to injure the plaintiffs. The plaintiffs' appeal to the Court of Appeal and application for leave to the Federal Court were dismissed. Subsequently, the plaintiffs filed a writ and statement of claim premised on the same facts against the defendants claiming for the same relief ('the second suit'). The defendants, except for the eighth defendant, once again proceeded to file their respective O 18 r 19 of the ROC applications to strike out the second suit on the grounds that the second suit was res judicata and that limitation had set in. The defendants' application was dismissed and hence this appeal. On the date of hearing of the appeals, the plaintiffs informed the court that they had filed six notices of motion to adduce fresh/new evidence ie exhs R1, R2, R3, R4 and R5 ('the documents') and these notices of motion had to be heard and disposed of first before the hearing of the striking out appeals. The issues for consideration in regard to the notices of motion to adduce fresh/new evidence were: (a) whether the fresh/new evidence could not have been obtained with reasonable diligence for use at the trial; (b) whether the fresh/new evidence, if given, would have an important influence on the results of the case, although it need not be decisive; whether the fresh/new evidence was material, relevant or probative to the determination of the defendants' appeals; and (c) whether the delay in filing the notices of motion had been explained by the plaintiffs. The primary issue for consideration was whether the learned High Court judge ought to have struck out the writ and statement of claim on the basis of: (i) the doctrine of res judicata applied and accordingly barred and was an abuse of process; and (ii) the claim was barred by limitation pursuant to s 6(1)(a) of the Limitation Act 1953 ('the Act').

Held, dismissing the notices of motion and allowing the appeals with costs:

(1) Exhibits R1, R2, R3, R4 and R5 were court documents and were not fresh/new evidence. The contention raised in the documents were events which occurred prior to the filing of the defendants' striking out application in the High Court. Further, the documents were not referred to by the plaintiffs before the High Court dismissed the defendants' application to strike out. At such a late stage, without proffering any explanation by way of an affidavit for their sheer indolence, the plaintiffs should not be allowed to adduce these documents at the appeal stage since these documents could have been obtained with reasonable diligence (see paras 24–25).

(2) It was rather incomprehensible that the plaintiffs now intended to adduce the documents at the appeal stage when the documents were never referred to at the hearing of the defendants' striking out application at the High Court. This gave the inference that the documents were not material nor relevant and had no important influence on the result of the striking out application and the appeal herein. Further, the documents were neither material nor relevant to a determination of the issues in the appeals which purely concerns the dismissal of the defendants' striking out application in the High Court. The documents did not have any probative value, were not material nor relevant and would have no bearing in the hearing of the appeals, which were premised on the issues on limitation and res judicata (see paras 26–27).

(3) The plaintiffs only decided to file the notices of motion at the eleventh hour, ie, one month before the hearing of the appeals, although the documents were well within their possession prior to the hearing of the defendants' striking out application. Taking into consideration the breach of natural justice that would result if the documents were allowed to be adduced as evidence, the court ought not to entertain such lackadaisical behaviour on the part of the plaintiffs who blatantly disregarded the due process of the court. In view of the foregoing, the plaintiffs' delay in filing the said notices of motion without any explanation whatsoever should not be tolerated and the motion to adduce the said documents as fresh/new evidence should not be allowed in the circumstances. In the upshot, the notices of motion should be dismissed (see paras 28–30).

(4) The parties, factual matrix, causes of action, particulars of the alleged conspiracy, claim for the alleged injury and loss suffered by the plaintiffs and the reliefs sought in this suit were all identical to the plaintiffs' pleaded case in the first suit. The 'continuing tort' referred to by the High Court was not a new cause of action. That cause of action was already present or in existence when the first suit was filed and no reasons or explanations were proffered by the plaintiffs as to why it was not pleaded and brought or filed together with the first suit. It was a clear attempt at re-litigating the cause of action and amounted to res judicata (see paras 38, 41–42 & 44).

(5) The filing of the second suit was an abuse of process. The second suit was no more than a repetition, in thinly veiled new guise of the cause of action of the first suit and the second suit was filed with the intention to re-litigate and re-open the earlier suit which was struck out and dismissed by the first court. Thus, the second suit ought to be dismissed on the ground that it was res judicata and an abuse of the process of court (see paras 45 & 50).

(6) The cause of action on a tort of conspiracy of intentional harm arose on 3 July 2008 and s 6 of the Act applied. The second suit was filed on 13 July 2017, about three years after the first suit was filed and nine years from the date the cause of action arose. Further, plaintiffs' alleged return to Malaysia was irrelevant to the accrual of the cause of action since the plaintiffs' purported return did not affect or postpone the accrual of the cause of action. Since the second suit was filed nine years from the date the cause of action arose, the plaintiffs were clearly out of time under s 6 of the Act (see paras 59, 64 & 68).

[Bahasa Malaysia summary

Perayu ('defendan') di sini memfailkan rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana dalam menolak permohonan pembatalan perayu berdasarkan A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Responden pertama ('plaintif pertama') adalah isteri dan pentadbir harta pusaka Balasubramaniam a/l Perumal ('si mati'), penyiasat persendirian berdaftar yang dilantik oleh salah seorang tertuduh dalam perbicaraan pembunuhan Altantuya, Abdul Razak Baginda, untuk memberikan perkhidmatan perlindungan berhubung dakwaan gangguan yang diterima oleh Abdul Razak Baginda dan keluarganya daripada Altantuya. Si mati meninggal dunia pada 15 Mac 2015. Plaintif memfailkan saman ke atas defendan ('saman pertama') bagi pihak dan untuk kepentingan harta pusaka si mati kerana kecederaan dan kerugian yang dialami oleh si mati. Kausa tindakan didasarkan pada tort konspirasi untuk merugikan di mana plaintif mendakwa bahawa defendan, dengan cara yang menyalahi undang-undang, bertindak secara individu dan/atau berkerjasama antara satu sama lain, telah menyebabkan kerosakan kepada plaintif dan si mati, kerana defendan dengan sengaja mengusir atau membuang, dengan itu menyingkirkan plaintif dan si mati dari Malaysia, di mana mereka diletakkan kepada kerugian dan perbelanjaan serta penderitaan mental. Defendan kemudian mengemukakan permohonan A 18 k 19 KKM untuk membatalkan saman pertama dan permohonan ini dibenarkan dengan alasan bahawa plaintif pertama tidak mempunyai locus standi untuk memulakan saman itu kerana dia tidak mengeluarkan surat-surat pentadbiran dan telah gagal untuk mengaku bahawa ada perjanjian antara defendan kelapan dan defendan lain untuk mencederakan plaintif. Rayuan plaintif ke Mahkamah Rayuan dan permohonan kebenaran ke Mahkamah Persekutuan telah ditolak. Selepas itu, plaintif memfailkan writ dan pernyataan tuntutan yang berdasarkan fakta yang sama terhadap defendan yang menuntut relif yang sama ('saman kedua'). Defendan, kecuali defendan kedelapan, sekali lagi memfailkan permohonan A 18 k 19 KKM untuk membatalkan saman kedua dengan alasan bahawa saman kedua adalah judicata dan had masa telah bermula. Permohonan defendan ditolak dan oleh itu rayuan ini. Pada tarikh pendengaran rayuan, plaintif memberitahu mahkamah bahawa mereka telah memfailkan enam notis usul untuk menambahkan keterangan baru iaitu eksh R1, R2, R3, R4

dan R5 ('dokumen') dan notis usul ini harus didengar dan diselesaikan terlebih dahulu sebelum mendengar rayuan pembatalan. Isu-isu untuk pertimbangan berkenaan dengan notis usul untuk menambahkan keterangan baru adalah: (a) sama ada keterangan baru tidak dapat diperoleh dengan ketekunan wajar untuk digunakan pada perbicaraan; (b) sama ada keterangan baru, jika diberikan, akan mempunyai pengaruh penting terhadap keputusan kes, walaupun tidak perlu menjadi penentu; sama ada keterangan baru penting, relevan atau probatif untuk menentukan rayuan defendan; dan (c) sama ada kelewatan memfailkan notis usul telah dijelaskan oleh plaintif. Isu utama untuk pertimbangan adalah sama ada hakim Mahkamah Tinggi yang bijaksana seharusnya membatalkan writ dan pernyataan tuntutan berdasarkan: (i) doktrin res judicata terpakai dan dengan demikian dilarang dan merupakan penyalahgunaan proses; dan (ii) tuntutan itu dihalang oleh had masa menurut s 6(1)(a) Akta Had Masa 1953 ('Akta').

Diputuskan, menolak notis usul dan membenarkan rayuan dengan kos:

(1) Ekshibit R1, R2, R3, R4 dan R5 adalah dokumen mahkamah dan bukan keterangan baru. Pertikaian yang dibangkitkan dalam dokumen adalah peristiwa yang terjadi sebelum pemfailan permohonan pembatalan defendan di Mahkamah Tinggi. Selanjutnya, dokumen tersebut tidak dirujuk oleh plaintif sebelum Mahkamah Tinggi menolak permohonan pembatalan defendan. Pada tahap terlambat seperti itu, tanpa memberikan penjelasan apa-apa melalui afidavit untuk kelalaian mereka, plaintif tidak boleh dibenarkan untuk menambahkan dokumen-dokumen ini pada peringkat rayuan kerana dokumen-dokumen ini dapat diperoleh dengan ketekunan wajar (lihat perenggan 24–25).

(2) Adalah tidak dapat difahami bahawa plaintif sekarang berniat menambahkan dokumen pada peringkat rayuan ketika dokumen tidak pernah dirujuk pada pendengaran permohonan pembatalan defendan di Mahkamah Tinggi. Ini memberikan kesimpulan bahawa dokumen tersebut tidak material dan tidak relevan dan tidak mempunyai pengaruh penting terhadap keputusan permohonan pembatalan dan rayuan di sini. Selanjutnya, dokumen tidak material atau relevan dengan penentuan isu-isu dalam rayuan yang semata-mata berkaitan penolakan permohonan pembatalan defendan di Mahkamah Tinggi. Dokumen-dokumen tersebut tidak memiliki nilai probatif, tidak material dan tidak relevan dan tidak akan mempengaruhi pendengaran rayuan, yang didasarkan pada isu had masa dan res judicata (lihat perenggan 26–27).

(3) Plaintif hanya memutuskan untuk memfailkan notis usul pada peringkat akhir, iaitu, satu bulan sebelum pendengaran rayuan, walaupun dokumen-dokumen itu ada dalam simpanan mereka sebelum

pendengaran permohonan defendan. Dengan mempertimbangkan pelanggaran keadilan semula jadi yang akan terjadi jika dokumen-dokumen tersebut dibenarkan untuk ditambahkan sebagai keterangan, mahkamah tidak seharusnya melayan tingkah laku tidak bertanggungjawab daripada plaintif yang secara terang-terangan mengabaikan proses mahkamah. Oleh itu, kelewatan plaintif memfailkan notis usul tersebut tanpa sebarang penjelasan tidak boleh dibiarkan dan usul untuk menambahkan dokumen tersebut sebagai keterangan baru tidak boleh dibenarkan dalam keadaan tersebut. Hasilnya, notis ususl harus diketepikan (lihat perenggan 28–30).

(4) Pihak-pihak, kaitan fakta, kausa tindakan, butir-butir konspirasi yang didakwa, tuntutan atas dakwaan kecederaan dan kerugian yang dialami oleh plaintif dan relif yang dipohon dalam saman ini semuanya serupa dengan kes yang diadukan oleh plaintif dalam tuntutan pertama. 'Tort berterusan' yang disebut oleh Mahkamah Tinggi bukanlah kausa tindakan baru. Kausa tindakan itu sudah ada atau ada ketika saman pertama difailkan dan tidak ada alasan atau penjelasan yang diajukan oleh plaintif mengapa tidak dituntut dan dibawa atau diajukan bersama dengan saman pertama. Ini adalah percubaan yang jelas untuk mengadili semula kausa tindakan dan mencapai res judicata (lihat perenggan 38, 41–42 & 44).

(5) Pemfailan saman kedua adalah penyalahgunaan proses. Saman kedua tidak lebih dari pengulangan, dengan cara baru yang terselubung tipis mengenai kausa tindakan saman pertama dan saman kedua difailkan dengan tujuan untuk mengadili semula dan membuka semula saman sebelumnya yang dibatalkan dan ditolak oleh mahkamah pertama. Oleh itu, saman kedua harus ditolak dengan alasan ia adalah res judicata dan penyalahgunaan proses mahkamah (lihat perenggan 45 & 50).

(6) Kausa tindakan terhadap tort konspirasi bahaya secara sengaja timbul pada 3 Julai 2008 dan s 6 Akta terpakai. Saman kedua difailkan pada 13 Julai 2017, kira-kira tiga tahun selepas saman pertama difailkan dan sembilan tahun dari tarikh timbulnya kausa tindakan. Selanjutnya, dakwaan pemulangan plaintif ke Malaysia tidak relevan dengan terakrunya kausa tindakan kerana pengembalian plaintif tidak mempengaruhi atau menangguhkan terakrunya kausa tindakan. Oleh kerana saman kedua difailkan sembilan tahun dari tarikh timbulnya kausa tindakan, plaintif jelas terlebih masa di bawah s 6 Akta (lihat perenggan 59, 64 & 68).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy [1995] 3 MLJ 445, CA (refd)
Cartledge (Widow and Administratrix of The Estate of Fred Hector Cartledge (deceased)) and Others v E Jopling & Sons, Ltd [1963] 1 All ER 341, HL (refd)
Chai Yen v Bank of America National Trust and Savings Association [1981] 2 MLJ 141, FC (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)
Dato Wira A Nordin bin Mohd Amin & Ors v Rajoo a/l Selvappan & Ors [2007] 5 MLJ 297, CA (refd)
Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74 (folld)
Henderson v Henderson [1843–60] All ER Rep 378 (refd)
Hii King Hiong v Sarawak Securities Sdn Bhd [2008] 3 MLJ 18, CA (refd)
Hue Ngee On v Chai Woo Sien (as public officer of the Hakka Association Kulai, Johor) [2009] 5 MLJ 176, CA (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70, FC (refd)
Lee Thye @ Lee Chooi Yoke v Societe Generale Cawangan Singapura [2009] 6 MLJ 24, CA (refd)
Lembaga Kumpulan Wang Simpanan Pekerja v Ong Lian Chee (suing as administrator of the estate of Goh Tin Poh, deceased) [2010] 4 MLJ 762, CA (refd)
Lo Fat Thjan & Ors v Public Prosecutor [1968] 1 MLJ 274, FC (refd)
Maxisegar Sdn Bhd v Silver Concept Sdn Bhd [2005] 5 MLJ 1, CA (refd)
Mulholland and another v Mitchell (by his next friend Hazel Doreen Mitchell) [1971] 1 All ER 307, HL (refd)
Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals [2017] MLJU 445; [2017] 1 LNS 622, CA (refd)
Mutual Way Development & Construction Sdn Bhd v Saiseki (M) Sdn Bhd [2008] 2 CLJ 232, CA (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Norma bt Awang Had (suing as the administrators/executors of the estate of Tan Sri Dato' Dr Awang Had bin Salleh, deceased) & Ors v Dato' Dr Hj Mohamed Haniffa bin Hj Abdullah [2016] 5 MLJ 754, CA (refd)
Ong Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504, HC (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494; [1986] CLJ Rep 256, SC (refd)
Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461; [2012] 9 CLJ 557, FC (refd)
Tasja Sdn Bhd v Golden Approach Sdn Bhd [2011] MLJU 67; [2011] 3 CLJ 751, FC (refd)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69, 69(2)
Legal Profession (Practice and Etiquette) Rules 1978 r 28

Limitation Act 1953 s 6, 6(1), (1)(a)
Rules of Court 2012 O 18 rr 8(1)(a), 19, 19(1)(d), O 32 r 13(1), O 41 r 8
Rules of Court of Appeal 1994 r 7, 7(2), (3A), (3A)(a), (3A)(b)

Appeal from: Civil Suit No WA-22NCVC-341–07 of 2017 (High Court, Kuala Lumpur)

Dinesh Bhaskaran (Serena Azizuddin with him) (Shearn Delamore & Co) in Civil Appeal No W-02(IM)(NCVC)-237–02 of 2018 for the appellant.
Rishwant Singh (Cecil Abraham & Partners) in Civil Appeal No W-02(IM)(NCVC)-286–02 of 2018 for the appellant.
B Thangaraj (Thangaraj & Assoc) in Civil Appeal No W-02(IM)(NCVC)-287–02 of 2018 for the appellant.
Satharuban Sivasubramaniam (Anne Sangeetha with him) (Satha & Co) in Civil Appeal No W-02(IM)(NCVC)-288–02 of 2018 for the appellant.
Mohd Hafarizam Harun (Norhazira Abu Haiyan with him) (Hafarizam Wan & Aisha Mubarak) in Civil Appeal No W-02(IM)(NCVC)-289–02 of 2018 for the appellant.
Chong Ian Shin (Arulampalam & Co) in Civil Appeal No W-02(IM)(NCVC)-348–02 of 2018 for the appellant.
Gopal Sri Ram (Americk Sidhu, Chin Yan Leng, Damien Chan and Khairul Anwar with him) (Americk Sidhu) Civil Appeal Nos W-02(IM)(NCVC)-237–02 of 2018, W-02(IM)(NCVC)-286–02 of 2018, W-02(IM)(NCVC)-287–02 of 2018, W-02(IM)(NCVC)-288–02 of 2018, W-02(IM)(NCVC)-289–02 of 2018 and W-02(IM)(NCVC)-348–02 of 2018 for the respondents.

Suraya Othman JCA (delivering judgment of the court):

INTRODUCTION

[1] The eight appellants'/defendants' herein are appealing against the decision of the learned High Court judge, Dato' Hue Siew Kheng made on 30 January 2018, dismissing the appellants' striking out applications under O 18 r 19 of the Rules of Court 2012 (PU (A) 205/2012).

BACKGROUND FACTS

[2] The first respondent/first plaintiff, (A Santamil Selvi a/p Alau Malay @ Anna Malay) is the wife and the administratrix of the estate of Balasubramaniam a/l Perumal ('the deceased').

[3] The deceased was at all materials times, a registered private investigator and had been engaged by one of the accused in the Altantuya murder trial, Abdul Razak Baginda in the months of July and October 2006, to provide

protection services in respect of the alleged harassment Abdul Razak Baginda and his family were receiving from Altantuya. The deceased passed away on 15 March 2015.

[4] The plaintiffs filed a suit against the defendants in the Kuala Lumpur High Court on 23 June 2014 through Civil Suit No 22NCVC-281–06 of 2014 ('first suit'). In this first suit, all the plaintiffs brought the suit on behalf of and for the benefit of the estate of the deceased for the harm and injury suffered by the deceased. In other words, the cause of action was grounded on the tort of conspiracy to injure wherein the plaintiffs alleged that the defendants, by unlawful means, acting individually and/or in concert with each other, had caused damage to the plaintiffs' and the deceased Balasubramaniam a/l Perumal, the late husband of the first plaintiff, in that the defendants had intentionally evict or remove, thereby uprooted the plaintiffs and the deceased from Malaysia, whereby they were put to loss and expense and mental anguish.

[5] The defendants in the first suit then proceeded to file their respective O 18 r 19 applications to strike out the first suit. On 11 December 2014, these applications were allowed (first order) by the High Court judge (HCJ) on the ground that the first plaintiff has no locus standi to institute the suit since she has not extracted the letters of administration and has failed to plead that there was an agreement between the eighth defendant and the other defendants to injure the plaintiffs. On appeal by the plaintiffs, the Court of Appeal dismissed the plaintiffs appeals. The plaintiffs then filed a motion for leave to the Federal Court which was also dismissed on 2 December 2015.

[6] On 13 July 2017, the same plaintiffs filed the writ and statement of claim ('SOC') premised on the same facts against the same defendants claiming the same relief ('second suit'). The first plaintiff, A Santamil Selvi brought the suit as the administratrix of the deceased estate as well as in her personal capacity. The other plaintiffs who are her children brought the suit in their personal capacities. The defendants, except for the eighth defendant (Deepak), once again proceeded to file their respective O 18 r 19 applications to strike out the second suit on the grounds that the second suit was res judicata and that limitation has set in.

[7] On 30 January 2018, a different HCJ (Dato' Hue Siew Kheng), heard the matter and dismissed the said O 18 r 19 applications (second order). Aggrieved, the defendants appealed to us.

[8] On the date of hearing of the defendants' appeals, the plaintiffs informed us that they had filed six notices of motion to adduce fresh/new evidence and these notices of motion has to be heard and disposed of first before the hearing of the striking out appeals. We heard the plaintiffs' motion

and after due consideration, dismissed the said motion. We then proceeded to hear the appeals by the defendants and after careful consideration of the written submissions and after hearing oral arguments, we unanimously allowed the appeals. We now provide our reasons for so doing and for convenience, the parties will be referred to as they were in the High Court or by their abbreviations.

The plaintiffs' notices of motion to introduce fresh/new evidence

[9] The plaintiffs filed six identical notices of motion under s 69(2) of the Courts of Judicature Act 1964, r 7 of the Rules of Court of Appeal 1994 and/or under the inherent jurisdiction of the court. They are encls 7, 8, 9, 12 and 13 by the first, ninth, fifth, fourth, seventh and third defendants' respectively. The purpose of these notices of motion is to move or seek leave of the court to introduce fresh/new evidence in the hearing of the present appeals (striking out appeals). The fresh new evidence which the plaintiffs' sought to adduce are as follows:

(a) the plaintiffs' application to strike out the eighth defendant's Deepak Jaikishan a/l Jaikishan Rewachand ('Deepak') statement of defence dated 6 November 2017 and to question the authority of Messrs Shafee & Co to act for the eighth defendant (exh 'R1');

(b) the affidavit of Americk Sidhu affirmed on 16 November 2017 (exh 'R2');

(c) the affidavit of Clare Rewcastle Brown affirmed on 15 November 2017 (exh 'R3');

(d) the sealed consent order dated 4 June 2018 (exh 'R4'); and

(e) the eighth defendant's statement of defence dated 25 October 2017 (exh 'R5').

THE PLAINTIFFS' SUBMISSION

[10] The plaintiffs submitted that their notices of motion should be allowed since these evidence are relevant to the proper consideration of the appeals filed as this court is required to be apprised of every available and admissible facts which would have a direct bearing on the eventual decisions. As to the consent order dated 4 June 2018 and the statement of defence dated 25 October 2017, these documents were not available at the time the striking out applications by all the defendants were heard and dismissed by the learned HCJ (second order). These evidence only materialised on the 4 June 2018 when the eighth defendant (Deepak) consented to the plaintiffs' application.

[11] The plaintiffs argued that these fresh/new evidence sought to be adduced in these appeals would render the appeals academic for the following reasons:

(a) the statement of defence (exh R5) filed by Deepak dated the 25 October 2017 does not plead res judicata or limitation;

(b) the exh R5 makes admissions to most of the allegations pleaded in the plaintiffs' statement of claim, except those concerning damages;

(c) the contents of exh R5 implicated all other defendants;

(d) the defendants in the appeals herein have filed statements of defence denying the plaintiffs allegations, contradicting the averments and admissions made in exh R5; and

(e) the plaintiffs claim against the eighth defendant (Deepak), remains extant and subject to a full trial.

[12] Further, the plaintiffs submitted that should the defendants appeals be allowed by this court, in that the plaintiffs writ and statement of claim be struck out; the consequence would be that the eighth defendant (Deepak) will end up as the only or sole defendant in the trial at the High Court. This may result in Deepak possibly seeking legal advice from his solicitors to bring in each of the defendants to indemnify and contribute by way of a Third party proceedings, which means that all the defendants will inevitably end up, once again, as parties to the proceedings in the High Court. As such, the plaintiffs contended that the defendants would be in a better position to defend the plaintiffs claim if they were to remain as defendants in the action before the High Court.

THE DEFENDANTS' SUBMISSIONS

[13] The plaintiffs' notices of motion were opposed by all the defendants. Briefly, to summarise, the defendants submitted that the plaintiffs notices of motion should be dismissed since the probative value of these 'evidence' are non-existent. This is so since these evidence are not material or relevant and will have no bearing in the hearing of the present appeals, which appeals rest on the issues of limitation and res judicata. The defendants stated that these 'evidence' which the plaintiffs sought to rely upon are not material or relevant based on the following reasons:

(a) these purported evidence are not in fact 'evidence';

(b) these evidence are neither material nor relevant to a determination of the issues in the appeals. The issues arising in the appeals are basically whether limitation and res judicata apply to bar the plaintiffs claim;

(c) the decision of the High Court which is the subject of the appeals is the order of the High Court dated 30 January 2018 which dismissed the O

18 r 19 application (second order). Save for the consent order of the High Court dated 4 June 2018, all the other so-called evidence pre-dates 30 January 2018 by many months;

(d) the affidavits of Americk Sidhu and Clare Rewcastle Brown (R2 and R3) deposed to matters of speculation, conjecture and hearsay;

(e) the affidavit of Americk Sidhu deposed to matters of controversy. Americk Sidhu is also a solicitor on record. The affidavit, if read, will be in breach of, inter alia, r 28 of the Legal Profession (Practice and Etiquette) Rules 1978 and O 41 r 8 Rules of Court 2012;

(f) an application to strike out is not an interlocutory application in which hearsay evidence is admissible;

(g) para 26 read with para 19 of Americk Sidhu's affidavit demonstrates a further breach of professional ethics in that Americk Sidhu met with a defendant who was represented by a firm of advocates and solicitors without the firm's prior permission. Following from such a meeting, the plaintiffs now seek to benefit from such breach of ethics and law by adducing Americk's affidavit in the hearing of this present appeal; and

(h) lastly and by no means least, the defendants herein were not given the chance to respond to these evidence (ie the notice of application; Americk Sidhu's and Clare Rewcastle Brown's affidavits and the eighth defendant's defence before the consent order of 4 June 2018 was granted). The defendants did not respond to these 'evidence' (whether by affidavit or in submissions) in the High Court. Therefore, there is a real risk of a breach of natural justice if these evidence are to be read in the Court of Appeal.

OUR DECISION

Relevant law on adducing fresh evidence

[14] The law to admit fresh/new evidence is well settled/trite. It is found in s 69 of the Courts of Judicature Act 1964 ('the CJA 1994') and r 7 of the Rules of the Court of Appeal 1994 ('the RCA 1994'). Section 69 provides as follows:

> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.

[15] The power of the court to admit fresh/new or further evidence at the hearing of an appeal is governed by r 7 of the RCA 1994 and the test is set out in r 7(3A) of the RCA 1994. Rule 7 states as follows:

> Rule 7 Power of Court to amend, admit further evidence, or draw inferences of fact.

(1) *The Court shall have* all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with *full discretionary power to receive further evidence* by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner.

(2) *Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought*.

(3A) *At the hearing of the Appeal further evidence shall not be admitted unless the Court is satisfied that —*

(a) *at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and*

(b) *the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.* (Emphasis added.)

[16] Rule 7(3A) of the RCA 1994 are generally known as the three conditions or tests to be met before fresh/new evidence may be allowed to be adduced. These three conditions/tests are the three conditions/tests enunciated or stipulated in the case of *Ladd v Marshall* [1954] 3 All ER 745 which is the landmark case on the principles of adducing fresh/new evidence. Lord Denning at p 748 held as follows:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: *first*, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: *second*, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: *third*, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[17] The principles in *Ladd v Marshall* have been approved and applied by our Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70. In the case of *Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy* [1995] 3 MLJ 445, the Court of Appeal reiterated as follows:

> Appellants' counsel cited *Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489. He suggested that merely because this evidence was not available at the civil trial, it should now be put in. *Ladd v Marshall* was applied by the Federal Court in *Lau Soo Sun v Government of Malaysia* [1970] 2 MLJ 70 at p 71. Suffian FJ (as he was then) said:
>
> > To justify the reception of this evidence three conditions must be fulfilled:
> >
> > First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as it presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.
>
> These were the tests enunciated by Denning LJ (as he then was) at p 748 in *Ladd v Marshall* [1954] 3 All ER 745.

[18] Thus, it is trite that in order for the plaintiffs to succeed in their notices of motion, the plaintiffs must satisfy the following three pre-conditions as laid down in *Ladd v Marshall* before these fresh/new evidence can be admitted at the hearing of the appeals proper. The plaintiffs must show as follows:

(a) these evidence could not have been obtained with reasonable diligence for use at the trial;

(b) these evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(c) these evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[19] It must be noted that these conditions/tests in *Ladd v Marshall* are not alternative but are cumulative and conjunctive in effect in that all the conditions must be fulfilled before such leave to admit fresh/new evidence is granted. In the Court of Appeal's case of *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1, the court stated:

> [4] The power of this court to grant leave to admit fresh evidence at the hearing of the appeal is governed by s 69(3) of the Courts of Judicature Act 1964 and r 7(3A) of the Rules Court of Appeal 1994. 'The special grounds only referred to in Section 69(3) of the Courts of Judicature Act and the tests set out in r 7(3A) of the Rules of the Court of Appeal 1994 are generally known as the *Ladd v Marshall* [1954] 3 All ER 745 conditions. It is settled by various decided cases that the three conditions are cumulative and conjunctive in effect and are not disjunctive in that all the conditions must be fulfilled before such leave to admit fresh evidence be granted.

(See also the Court of Appeal's case of *Hii King Hiong v Sarawak Securities Sdn Bhd* [2008] 3 MLJ 18).

[20] Further, as a rule, since there ought to be finality in litigation, the court is generally reluctant to admit fresh/new evidence on appeal. In the case of *Mulholland and another v Mitchell (by his next friend Hazel Doreen Mitchell)* [1971] 1 All ER 307, the House of Lords held:

per Lord Viscount Dilhorne at p 311:

> It is, however, unusual for fresh evidence to be allowed to be given on the hearing of such an appeal. *Special grounds have to be shown for its admission unless the evidence is of matters which have occurred after the date of trial (RSC Ord 59 r 10 (1)).*

per Lord Pearson at p 314:

> *It is in general undesirable to admit fresh evidence on appeal, because there ought to be finality in litigation*. (Emphasis added.)

[21] The court also disapproves of parties who file the application to introduce fresh/new evidence as a means to re-construct or to re-open their case and thus will only allow the admission of fresh/new or additional evidence on appeal in clearly exceptional circumstances. This was held by the Federal Court in *Lo Fat Thjan & Ors v Public Prosecutor* [1968] 1 MLJ 274 at p 277 which state as follows:

> *We would deprecate generally the admission of additional evidence on appeal except in clearly exceptional circumstances. The adversary system in our trials is hardly compatible with allowing lacunae in the case of any party to be filled in by afterthoughts or countenancing reconstruction of any case after it has failed at the trial.* (Emphasis added.)

[22] In the case of *Mutual Way Development & Construction Sdn Bhd v Saiseki (M) Sdn Bhd* [2008] 2 CLJ 232, the Court of Appeal showed the same disapproval of parties filing the application to introduce fresh/new evidence to re-open their case which the court felt would lead to unfairness to the other party who will be confronted with new evidence for the first time and will result in the case being prolonged and thus increase in the costs of litigation. The court opined that an improper exercise to grant or accede to such application at a late stage will make the claim lose any semblance of proportionality and tantamount to an abuse of its process.

> 22. In our view, to accede to this application at this stage, against the factual background of this case, *would not only be an improper exercise of the Courts' discretion, but tantamount to an abuse of its process. It would be equivalent to reopening of this case on a piece of evidence which we feel could have been made available with reasonable diligence on the part of the plaintiff.*
>
> That new evidence too, at first glance, seems not to be inherently probable or credible and thus, cannot with certainty be said to meet the requirement of having a determining influence on the outcome of the case.
>
> 23. The plaintiff had waited for 12 long years to see the outcome of this litigation. Why was it that after all these long years that evidence was not available, yet in a

mere 5-month period after the judgement, it suddenly surfaced? Now that the High Court had given its judgement, to allow for this case to be reopened would not, in our view, be in the interest of justice.

The balance of the purchase price of the Crusher claimed by the plaintiff is only RM69,500. *It would be highly unfair to the plaintiff if we were to allow it to be confronted with this new evidence for the first time at this stage. Also, taking into account the time and cost factors if this case is re-opened, we feel that this claim would lose any semblance of proportionality.*

24. The words of Yong Pung How CJ in *Chong Joon Wah v Tan Lye Thiang* [1991] 3 MLJ 353 must serve as reminder on what we say above. We adopt what the learned Chief Justice said in this passage —

It need hardly be said that there must be finality in litigation. Even apart from the principles laid down in *Ladd v Marshall*, *the costs of litigation require that some semblance of proportion must be maintained,* and the Court of Appeal would be reluctant to order a new trial when the amount at stake is so small and the proceedings in court have already taken so long. (Emphasis added.)

ISSUES TO BE DETERMINED

[23] The issues are as follows:

(a) whether the fresh/new evidence could not have been obtained with reasonable diligence for use at the trial;

(b) whether the fresh/new evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

whether the fresh/new evidence is material, relevant or probative to the determination of the defendants' appeals;

(c) whether the fresh/new evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible; and

(d) whether the delay in filing the notices in motion has been explained by the plaintiffs.

Whether the fresh/new evidence could not have been obtained with reasonable diligence for use at the trial

[24] We agree with the defendants contention that R1, R2, R3, R4 and R5 which are notice of application, affidavits, consent order and the eighth defendant's Deepak's defence are court documents and not fresh/new evidence. The contention raised in the documents in R1, R2, R3 and R5 were not events which occurred after the hearing of the defendants application to strike out the plaintiffs' writ and statement of claim. In fact, the contentions raised in the said

documents are events which occurred prior to the filling of the defendants' striking out application in the High Court. The defendants' application to strike out the plaintiffs' writ and statement of claim was heard on 30 January 2018 and except for R4 which was the consent order dated 4 June 2018, the rest of the documents, R1, R2, R3 and R5 were available prior to the application for striking out.

[25] Further, these documents which were available before the High Court were not referred to by the plaintiffs before the High Court dismissed the defendants' application to strike out on 30 January 2018. If, for example, the plaintiffs' had wanted to use these two affidavits, the plaintiffs could have invoked O 32 r 13(1) of the Rules of Court 2012 which allows the plaintiffs' to file a notice of intention to refer to these affidavits (R2 and R3) at the hearing of the defendants' striking out application. This, the plaintiffs' failed to do. The plaintiffs now wished to adduce these evidence in the appeals before us having elected in the High Court not to refer to these same documents. At such a late stage, without proffering any explanation by way of an affidavit for their sheer indolence, we are of the view that the plaintiffs should not be allowed to adduce these documents at the appeal stage since these documents could have been obtained with reasonable diligence. In fact these documents are the plaintiffs' own documents and were in their possession and available to them. As such, the fresh/new evidence in R1, R2, R3 and R5 sought to be introduced by the plaintiffs completely failed to satisfy the first condition/test enunciated in *Ladd v Marshall*.

Whether the fresh/new evidence, if given, would have an important influence on the result of the case, although it need not be decisive

Whether the fresh/new evidence is material, relevant or probative to the determination of the defendants' appeals

[26] As stated earlier, the plaintiffs did not file a notice of intention to refer the affidavits, R2 and R3 pursuant to O 32 r 13(1) of the Rules of Court 2012 to refer to the affidavits at the hearing of the defendants' striking out application. In this we agree with the defendants' contention that it is rather incomprehensible that the plaintiffs now intended to adduce the said documents at this juncture, at the appeal stage when these said documents were never referred to at the hearing of the defendants' striking out application at the High Court. This gives the inference that the said documents are not material nor relevant and has no important influence on the result of the striking out application and the appeal herein. In fact, the High Court had dismissed the defendants' striking out application without sight of the said documents. This goes to show that the said documents are not material nor relevant in influencing the High Court's decision then (on 30 January 2018). If the said

documents were not material nor relevant then on 30 January 2018), how could it be material or relevant in the determination of the present appeals? In such circumstances where the documents are not material nor relevant in the determination of the appeals, the court will not allow the admission of the fresh/new evidence. This can be seen from the Federal Court's decision in *Chai Yen v Bank of America National Trust and Savings Association* [1981] 2 MLJ 141 which was applied by the Court of Appeal in *Lee Thye @ Lee Chooi Yoke v Societe Generale Cawangan Singapura* [2009] 6 MLJ 24.

[27] Further, the said documents (R1 to R5) are neither material nor relevant to a determination of the issues in the appeals which purely concerns the dismissal of the defendants' striking out application in the High Court. The issues arising in the appeals is premised basically on whether res judicata and limitation apply to bar the plaintiffs' claim. The plaintiffs' application to strike out the eighth defendant's defence dated 6 November 2007 (R1), the affidavits of Americk Sidhu (R2) and Clare Rewcastle Brown (R3) which deposed to matters of speculation, conjecture and hearsay, the statement of defence of the eighth defendant Deepak (R5) which made allegation of a conspiracy by the defendants to uproot the plaintiffs and the deceased Bala from Malaysia to India which caused loss and expense to the plaintiffs; all these documents (except R4), as stated earlier, were available prior to the striking out applications by the defendants were heard in the High Court. These documents including the consent order between the plaintiffs' and the eighth defendant, Deepak (R4) to our mind do not have any probative value, are not material nor relevant and will have no bearing in the hearing of the appeals, which are, we must reiterate, premised on the issues on limitation and res judicata. (See the Court of Appeal case of *Hue Ngee On v Chai Woo Sien (as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176 on what constitute relevant and material evidence). As such, we are of the view that the plaintiffs had failed to satisfy the second condition/test in *Ladd v Marshall* for us to allow these documents to be adduced at the hearing of the present appeals.

Whether the delay in the filing of the notices of motion has been explained by the plaintiffs

[28] The defendants' striking out applications were dismissed on 30 January 2018 and these present appeals were filed on 8 February 2018. However, the plaintiffs only decided to file the said notices of motion on 26 June 2018, at the eleventh hour, which is one month before the hearing of the present appeals which were fixed on 26 July 2018, although the said documents were well within their possession prior to the hearing of the defendants' striking out application (save for the sealed order dated 4 June 2018). Further, the defendants were not given any notice and the opportunity to respond to the notice of application (R1); Americk Sidhu's and Clare Rewcastle Brown's

affidavits (R2 and R3); and the eighth defendant's defence. The defendants were not heard in the High Court when the order of 4 June 2018 was granted. Thus the defendants' were not able to respond to these 'evidence' (whether by affidavit or in submissions) in the High Court resulting in a real risk of a breach of natural justice if these evidence are now allowed in the hearing of the present appeals when these 'evidence' were deliberately not referred to by the plaintiffs in the High Court in response to the defendants' striking out application.

[29] We are of the view that taking into consideration the breach of natural justice that will result if the said documents are allowed to be adduced as evidence, apart from the other reasons given above, this court ought not to entertain such lackadaisical behavior on the part of the plaintiffs who blatantly disregarded the due process of this court. In view of the foregoing, the plaintiffs' delay in filing the said notices of motion without any explanation whatsoever should not be tolerated and the motion to adduce the said documents as fresh/new evidence should not be allowed in the circumstances.

CONCLUSION

[30] Based on the reasons above, the plaintiffs' had failed to satisfy the requirement under s 69(2) of the CJA 1994 and the three conditions/tests set out under r 7(2), (3A)(a) and (b) of the Rules of RCA 1994 which encompasses the three conditions/tests as enunciated in the case of *Ladd v Marshall* which required all the three conditions/tests to be satisfied cumulatively before a court can grant fresh/new evidence to be adduced under the said section and Rules. In the upshot, the notices of motion in encls 7, 8, 9, 12 and 13 should be dismissed. Costs is in the cause.

THE DEFENDANTS' STRIKING OUT APPEALS

[31] As stated earlier, when the second suit was filed, all the nine defendants filed their Notices of Application under O 18 r 19 to strike out the suit. The eighth defendant Deepak subsequently withdrew his application. A different HCJ, Dato' Hiew Siew Kheng who heard the matter on 30 January 2018 dismissed all the eight defendants' O 18 r 19 striking out applications with costs of RM2,000. All the eight defendants appealed and the appeals are advanced on two main grounds as follows:

(a) the doctrine of res judicata applies. This suit is, accordingly barred and is an abuse of process; and

(b) the claim was barred by limitation pursuant to s 6(1)(a) of the Limitation Act 1953 and the plaintiffs are not able to overcome the limitation defence.

FINDINGS OF THE HIGH COURT

[32] In arriving at her decision, the Learned HCJ made the following findings:

(a) that some of the pleadings in the said second suit are similar, if not identical to the said first suit and that the plaintiffs have pleaded a cause of action on a 'continuing tort' which was not previously pleaded;

(b) that the cause of action or issue of estoppel would not apply as the said first suit was premised on a tort of conspiracy whilst the said second suit concern a continuing tort;

(c) that the merits of the case were never delved into in the said first suit; and

(d) that the issue of limitation should be decided only after full trial and not at the preliminary stage.

ISSUES FOR DETERMINATION

[33] The primary issue to be determined by us is whether the learned High Court judge ought to have struck out the said writ and statement of claim on the basis of the following grounds:

(a) the doctrine of res judicata applies. This suit is, accordingly barred and is an abuse of process; and

(b) the claim was barred by limitation pursuant to s 6(1)(a) of the Limitation Act 1953 and the plaintiffs are not able to overcome the limitation defence.

SUBMISSION OF PARTIES

[34] On res judicata/issue estoppel, the plaintiffs submitted that the second/present suit is not barred by res judicata on the basis that the present suit involves a different cause of action, that of a continuing tort as against the first unsuccessful suit which is based on a tort of conspiracy. Therefore, res judicata or cause of action estoppel would not apply. Further, there had been no trial on the merits of the first suit and therefore issue estoppel could not possibly apply. This is evident from the decision of the Court of Appeal which ordered the first suit by the plaintiff against the eighth defendant Deepak to be remitted back to the High Court to be heard on its merits.

[35] On limitation, the plaintiffs contended that the present suit is based on a continuing tort which ended in February 2013, when the deceased and his family returned to Malaysia which would mean that limitation would only begin to run from that date.

[36] The defendants responded by submitting that res judicata applies since the same plaintiffs had previously filed the first suit based on the same facts against the same defendants claiming the same reliefs which suit had been dismissed by the first High Court judge. On the issue of limitation, the defendants submitted that the second/present suit is barred since the cause of action had accrued on 3 July 2008 and the second/present suit was filed only on 13 July 2017, that is nine years after the acts and the damage had allegedly occurred. Therefore, the plaintiffs' claim, which is based on the tort of conspiracy, is barred by limitation pursuant to s 6(1) of the Limitation Act 1953 (Act 254).

DECISION OF THE COURT

Res judicata

[37] A perusal of the statements of claim in the first and the second/present suit disclosed that the plaintiffs, the defendants (the parties), the facts of the case and the reliefs sought by the plaintiffs against all the defendants are the same, if not identical, This is conceded to by the learned HCJ in her GOJ whereby Her Ladyship stated that some of the pleadings in the second suit are similar, if not identical to the first suit and that the only difference is that the present suit had pleaded a cause of action on a continuing tort of intentional harm and the previous suit is on a tort of conspiracy, which Her Ladyship deemed to be a different cause of action and thus does not attract the application of issue estoppel against the present suit.

[38] We compared both the first and the second/present suit and this is what we found. The parties, the factual matrix, the causes of action, the particulars of the alleged conspiracy, the claims for the alleged injury and loss suffered by the plaintiffs and the reliefs sought in the second/present suit are all identical to the pleaded case of the plaintiffs' in the first suit.

[39] The cause of action in the first suit is a claim under the tort of conspiracy and the plaintiffs' alleged that the defendants, acting individually and/or in concert with each other had caused damage to the deceased and the plaintiffs by unlawful acts or means by forcing the plaintiffs to live in a foreign country for the period from July 2008 to March 2013 which disrupted the lives of the plaintiffs.

[40] In the present suit, a similar cause of action was pleaded where it was again alleged that all the defendants, acting in concert, intentionally uprooted and evicted the plaintiffs and the deceased from their home in Malaysia and deprived them of their normal life and thus the defendants are liable for the intentional harm or injury caused to them.

[41] One way or another, the causes of action in both the suits are one and the same, that is a tort of conspiracy to do harm. Her Ladyship in holding that the plaintiffs had pleaded a new cause of action in the present suit, namely a 'continuing tort' fell into error in not seeing this. This is so since the reference by the plaintiffs in the statement of claim to a continuing wrong/tort in the present suit is only when contending that the plaintiffs are not barred by limitation from bringing the second/present suit. The 'continuing tort' referred to by Her Ladyship is not a new cause of action. The 'continuing tort' is in reference to the contention by the plaintiffs to the fact that time only begin to run from the date the plaintiffs were able to return to Malaysia from their alleged forced exile for the purpose of filing of a suit.

[42] Even if the 'continuing tort' could be said to be a different cause of action, which we are of the view it is not; that cause of action was already present or in existence when the first suit was filed on 9 June 2014 and no reasons or explanations were proffered by the plaintiffs as to why it was not pleaded and brought or filed together with the first suit.

[43] In the case of *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 at p 76, Sharma J, (when dealing with res judicata in interlocutory applications), gave the following guidance:

> It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively res judicata.

[44] Thus if a cause of action or issue was available or present or in existence or could have been raised when the first suit was filed on 9 June 2014, then it should have been raised or pleaded then, otherwise it is a clear attempt at re-litigating the cause of action (which had been unsuccessful or dismissed) and amounts to res judicata in its extended or broader sense as envisaged in the case of *Henderson v Henderson* [1843–60] All ER Rep 378.

Abuse of process

[45] The filing of the second/present suit is an abuse of process. It should also be borne in mind that the first suit was struck out, inter alia, under O 18 r 19(1)(d) on the ground that it was an abuse of process.

[46] In *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461 at pp 472–473; [2012] 9 CLJ 557 at pp 571–572, the Federal Court held as follows:

> [16] It is our judgment that under the new O 34 and particularly under r 3(1), it would require the High Court to take into account all the breaches and non-compliances by the plaintiff at the time of evaluation of its failure to progress

A the case before deciding whether to dismiss the action. *The Court of Appeal in our view in the present case was accordingly wrong in holding that the plaintiff here could re-file and maintain the second suit in spite of holding that the first suit was rightfully dismissed for delay in failing to progress the case.*

...

B [18] Based on the factual circumstances of the present case *we are of the view that there is clearly an abuse of the process of the court by the plaintiff in filing the second suit* for the following reasons. (Emphasis added.)

C **[47]** The Supreme Court in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 at p 499; [1986] CLJ Rep 256 at 261–262 held as follows:

D *The attempt by way of the instant proceedings to relitigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the Court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in Hunter v Chief Constable of the West Midlands Police and Ors [1982] AC 529 (at page 542).* (Emphasis added.)

E **[48]** In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at pp 198–202 per Peh Swee Chin FCJ:

The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:

F The plea of res judicata applies, except in special cases, *not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.*

G ...

To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg please see s 40 of the Evidence Act 1950, it will be readily understood that *when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties*.

H ...

I The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.

In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel per rem judicatum and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence. A few cases below will illustrate the point.

...

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, *while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel per rem judicatum.*

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It *is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.*

[49] The Court of Appeal in *Norma bt Awang Had (suing as the administrators/executors of the estate of Tan Sri Dato' Dr Awang Had bin Salleh, deceased) & Ors v Dato' Dr Hj Mohamed Haniffa bin Hj Abdullah* [2016] 5 MLJ 754 is on all fours with the facts of our case. On its facts, the High Court had struck out and dismissed a claim. An appeal against that order did not prevail. A second, similar claim was then commenced. The High Court struck out the second claim on the basis of res judicata and abuse of process. On appeal to the Court of Appeal, the Court of Appeal held:

[14] Having said that, we hasten to add that under O 18 r 19 and/or the inherent jurisdiction, *a court is conferred with the powers to summarily arrest the abuse of re-litigating spent causes* ...

[17] In the case of *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 All ER 673, the brief facts are that clients brought claims for negligence against their former solicitor in three separate cases and these claims were struck out based on the solicitors reliance on the immunity of advocates from suits for negligence. The Court of Appeal in allowing the three appeals, held that these claims fell outside of the scope of the immunity and should not have been struck out. On appeal to the House of Lords, Their Lordships had to determine, inter alia, whether to abolish the immunity from actions in negligence enjoyed by advocates. One argument in support of the retention of this immunity was that it was still justified in the public interest to prevent collateral attacks on decisions of the court where litigants blamed their attorneys for the outcome of their cases increasing the possibility of conflicting

judgments. The House of Lords, by a majority, dismissed the appeals and abolished the immunity, Lord Hoffmann at p 703 of the judgment, acknowledged that there is a public policy against re-litigating a decision of a court of competent jurisdiction where he said:

> *The law discourages litigation of the same issues except by means of an appeal*. The Latin maxims often quoted are nemo debet bis vexari pro una et eadem causa and interest rei publicae ut finis sit litium. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The First is concerned with the interest of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: autrefois acquit, res judicata and issue estoppel.
>
> The second policy is wider: it is concerned with the interests of the state. *There is a general public interest in the same issue not being litigated over again*.
>
> ...
>
> [19] Now, the doctrine of res judicata in the modern law comprehends *three distinct components* which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are:
>
> (a) cause of action estoppel, which where applicable, is an absolute bar to re-litigation between the same parties or their privies;
>
> (b) issue estoppels, where applicable, also prevents the reopening of particular points which has been raised and specifically determined in previous litigation between the parties, but is a subject to an exception in special circumstances; and
>
> (c) *Henderson v Henderson [1843–60] All ER Rep 378 abuse of process, which gives rise to a discretionary bar to subsequent proceedings*, depending on whether in all the circumstances, taking into account all the relevant facts and various interest involved, *'a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before'* (per Lord Bingham, in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 at p 499).
>
> ...
>
> [23] The rule relating to an abuse of process is thus two fold. The first relates to those points which were actually decided by the court; this is res judicata in the strict sense. *Secondly, those which might have been brought forward at the time, but were not*. The second sense is not a true case of judicata but rather is founded on the principle of public policy in preventing multiplicity or actions; it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process (per Lord Wilberforce in *Brisbane City Council v A-G for Queensland* [1979] AC 411).
>
> [26] The learned judge then referred to the order of encl 362 and states:
>
> Jelas pada mahkamah bahawa based on this order sahaja ia menunjukkan

> bahawa kuasa tindakan pihak plaintif telah pun ditamatkan secara final dan saya difahamkan bahawa tiada rayuan ataupun rayuan telah pun berhenti di situ sahaja dan oleh itu perintah ini adalah satu perintah yang masih lagi subsisting, ialah C berkuatkuasa yang mana telah pun secara denifitenya determine, menamatkan tuntutan pihak plaintif terhadap defendan berhubungnya dengan kuasa tindakan yang mana adalah sama dalam kes ini.

[27] In our view, the learned judge was correct in recognising that the cause in Consolidate Suit No 1412 had been previously determined by the Kuala Lumpur High Court. It is pertinent to note that the earlier cause in Consolidated Suit No 1412 had been previously determined by the Kuala Lumpur High Court not by a simpliciter order of striking out but by an order of recording a dismissal ...

[30] After taking into account the entire factual matrix of the case, we hold that *the present suit is barred by a cause of action estoppel and/or an abuse of the court process on the part of the appellants*.

[31] In considering the matter, we bear in mind the principle set down by Keane J in *McCauley v McDermott* 2 ILRM 486 at p 498:

> In cases of this nature, the courts are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of res judicata where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she had no control. Res judicata must be applied in all its severity, however, where to do otherwise would be to permit a party bound by an earlier judgment to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled again by a law suit which has already been decided.

[32] *We are of the view that the present action is in fact no more than a repetition, in thinly veiled new guise of the cause of earlier proceedings in Consolidated Suit No 1412 which had been struck off and dismissed.* (Emphasis added.)

[50] On the factual matrix of this case, we are of the view, that the second present suit is in fact no more than a repetition, in thinly veiled new guise of the cause of action of the first or earlier suit and the second/present suit was filed with the intention to re-litigate and re-open the earlier suit which was struck out and dismissed by the first court. This is so since the parties, the facts of the case, the causes of action and the reliefs sought by the plaintiffs are identical, if not one and the same. Even if the 'continuing tort' as averred to in the second/present suit could be said to be a different cause of action, which we are of the view it is not; that cause of action was already present or in existence when the first suit was filed on 9 June 2014 and no reasons or explanations were proffered by the plaintiffs as to why it was not pleaded and brought or filed together with the first suit. In light of the principle expounded by *Henderson v*

Henderson, that a party should bring forward once and for all every points which properly belonged to the subject of litigation and not to litigate by way of instalments, the second/present suit ought to be dismissed on the ground that it is res judicata in its extended or broader sense and an abuse of the process of court. The learned HCJ's finding to the contrary is thus unsustainable.

Limitation

[51] On limitation, as stated earlier, the plaintiffs contended that the second present suit is based on a continuing tort which ended on 25 February 2013, when the deceased and his family returned to Malaysia which would mean that limitation would only begin to run from that date. The defendants, on the hand, submitted that the second/present suit is barred by limitation since the cause of action had accrued on 3 July 2008 and limitation would have set in on 4 July 2014. The fact that the second/present suit was only filed on 13 July 2017, that is nine years after the acts and the damage had allegedly occurred on 3 July 2014, the plaintiffs' claim, which is based on the tort of conspiracy, is thus barred by limitation pursuant to s 6(1) of the Limitation Act 1953 (Act 254).

[52] Under s 6(1)(a) Limitation Act 1953 (Act 254), the limitation period for a cause of action founded on tort is six years from the date on which the cause of action accrued. Section 6(1)(a) of the Limitation Act 1953 (Act 254) reads as follows:

> 6 Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions *shall not be brought after the expiration of six years from the date on which the cause of action accrued*, that is to say —
>
> (a) *actions founded* on a contract or *on tort*. (Emphasis added.)

[53] It must be noted that the first suit which was dismissed, was based on the tort of conspiracy and was filed within time on 9 June 2014, just before the expiry of the six years period of limitation which fell on 4 July 2014. The second/present suit, which is also based on a tort of conspiracy, was filed on 13 July 2017, about three years after the expiry of the period of limitation and nine years from the accrual of the cause of action.

[54] The cause of action pleaded by the plaintiffs which amounts to a tort of conspiracy of intentional harm are the alleged concerted acts of the eight defendants' on 3 July 2008 and/or 4 July 2008 which caused the plaintiffs to be uprooted from their home in Malaysia to a foreign country and thus depriving them of their normal life. The 'continuing tort', which Her Ladyship deemed as a new cause of action, as stated by us earlier at para 41 of this judgment, is in

reference to the allegation by the plaintiffs that they could not filed the second/present suit earlier due to their 'forced exile', which exile ended when they returned to Malaysia on 25 February 2013. When one looks at the statement of claim, it is clear that the plaintiffs did not plead a continuing tort except to make a bare averment that the intentional harm inflicted upon them continued until their return to Malaysia on 25 February 2013 and accordingly, they averred that their rights to bring the present suit only commenced from 25 February 2013. This bare averment on the part of the plaintiffs is in reference to their right to file a suit only when they are able to so and that time only begins to run from the date of their arrival in Malaysia on 25 February 2013. Her Ladyship by simply accepting this bare averment, without more, fell into error when she made a finding that due to this 'forced exile' allegedly imposed by the eight defendants on the plaintiffs, has resulted in a creation of a new cause of action, that of a continuing tort which was not previously pleaded in the first suit.

[55] Further, on perusal of the judgment of the first judge who heard and allowed the striking out applications by the eight defendants in the first suit, this issue was canvassed and Her Ladyship had made specific findings that the safety of the plaintiffs was never an issue since their life were not in jeopardy necessitating the family to leave Malaysia. Her Ladyship also found that the first and the fourth plaintiffs were able to live in Malaysia from 20 September 2008 till 2013 and the deceased Bala was able to come back to Malaysia several times. Excerpts of Her Ladyship judgment are as follows:

> The Learned Counsel for the fourth Defendant submitted that from the pleaded case the plaintiffs' seem to hinge on the safety of the Deceased's family and their lives were jeopardy necessitating the family to leave Malaysia from fourth July 2008 until 2013. *However, based on the documentary exhibit (Re: SSAM-1) the safety of the family was never an issue. The first and fourth plaintiffs' did not live in India from 20.9.2008 until 2013 and have been living in Malaysia throughout that period. In fact the Deceased himself admitted coming back to Malaysia several times* and the plaintiffs' also admitted that they have also travelled to India to meet the deceased. (Emphasis added.)

[56] The findings of fact made by the first judge were based on the documentary evidence which is the typed-written answers of the deceased to the questions posed from his own solicitor. What is evident from the answers given by the deceased to his solicitor in late 2009 clearly showed that the safety of plaintiffs was never an issue and the first and fourth plaintiffs did not live in India from 20 September 2008 until 2013. In answer to Q23, the deceased had replied that after 20 September 2008, the deceased had sent the plaintiffs' back to Kuala Lumpur to stay with his mother in law in Sentul. The relevant parts of the statement of the deceased are herein reproduced as follows:

> Q23: How did you manage to extend your 1 month visas?

A: Our visas expired on the 21st August 2008. Deepak's people had promised to get an extension for 1 year for us but nothing was done. So I had to get a 1 month extension for myself and my family till 20th September 2008.

I then sent my wife and children back to KL to stay with my mother in law in Sentul without Deepak's knowledge.

I remained in Madras trying to get my visa extended. Deepak's agent called Kumar tried to help me but after 5 months nothing had happened. I complained about this to Deepak and ASP Suresh when they visited me in Chennai. *Deepak called Kumar who returned the passport to me* with a sick certificate saying I could not have left the country due to an illness. This had to be done as I was then in India illegally as my visa had expired.

I then asked for help from my wife's uncle who is a state exco member for Karaikal district. He managed to get my visa extended until fifth September 2009.

Q24: Did you return to Malaysia during this period?

A: *Yes, I returned a few times to sort out some of my personal affairs.* Each time I returned I entered the country via Thailand across the Malaysia Thai border at Bukit Kayu Hitam and left the same way. I did not go through Malaysian immigration.

I did not contact anyone each time I returned as I was afraid Deepak would find out. The only person who knew I had returned to Malaysia was ASP Suresh but he did not let Deepak know.

He was upset with me for allowing my wife and children to return to Malaysia but I explained to him that my children needed to be educated and they could not get into a local school in Chennai.

Whenever I returned to Malaysia I used to stay with my wife and mother in law in Segambut.

Q25: Where did your wife stay all the time she was in Malaysia?

A: *She stayed with my mother in law in Segambut and managed to get my children into a school in Sentul. She did come to Chennai a few times with the children to visit me*.

Q26: Where are your wife and children now?

A: They are at present in Chennai. I managed to enroll my 2 eldest children into school there. *My wife may return to KL so that my youngest child can receive his schooling there*. I will have to stay with my eldest two children in Chennai.

Q27: Can you remember the dates you returned to Malaysia?

A: *Yes, I was in KL from the 16.02.2009 to the 05.03.2009*. During this period I met Deepak at his office in Sungai Besi. He was very worried I had returned to Malaysia and asked me to go back to Chennai immediately. He warned me that my life would be in danger if I stayed any longer.

The second time I returned to Malaysia was from the 11.04.2009 to the 02.05.2009.

The third time I returned to Malaysia was at the end of July 2009.

[57] The specific findings of Her Ladyship in the first suit which was supported by the answers/statements given by the deceased Bala debunked the averment by the plaintiffs that they could only filed their second/present suit when they returned to Malaysia on 25 February 2013. The deceased Bala, had by his own admissions, returned to Malaysia several times. He was in Malaysia in 2008, then from 16 February 2009 till 5 March 2009 and again at the end of July 2009. The first plaintiff who is his wife and the fourth plaintiff who is his youngest child, stayed in Malaysia with the first plaintiff's mother in Segambut from 20 September 2008 until 2013. From this, we can see that there were ample opportunities for the deceased Bala and his wife to file the second suit. In fact, they had filed the first suit within time on 9 June 2014 after their return from Chennai, India on 25 February 2013. Since they had filed the first suit within time, there was no reason why they could not have filed the present suit within time too. Thus, their averment that they were prevented to file the second suit earlier due to being forcibly exiled in Chennai, India and unable to return to Malaysia in time is unacceptable.

[58] On that premise, we are of the view that the issue of a continuing tort does not arise. Neither is the continuing tort a new cause of action as found by Her Ladyship since the causes of action for both the first and second/present suits are similar, identical or are one and the same; which is the tort of conspiracy to do intentional harm. That being so, s 6(1)(a) of the Limitation Act 1953 (Act 254) provides for the filing of a suit based on a cause of action on a tort to be done within six years from the date of the accrual of the cause of action, failing which, the suit will be barred by limitation.

[59] As averted to earlier, the plaintiffs have expressly pleaded that the alleged acts complained of (the tort of conspiracy of intentional harm by unlawful means, uprooting the plaintiffs from Malaysia to a foreign land) occurred on or about 3 July 2008. Further, the plaintiffs are claiming for damages commencing from 4 July 2008. Thus based on their pleaded case, the cause of action on a tort of conspiracy of intentional harm arose on 3 July 2008 and s 6 of the Limitation Act 1953 (Act 254) applies.

[60] In the case of *Dato Wira A Nordin bin Mohd Amin & Ors v Rajoo a/l Selvappan & Ors* [2007] 5 MLJ 297, the court held at para 19 at p 307 that s 6 of the Limitation Act 1953 (Act 254) applies in a claim based on the tort of conspiracy:

> [19] We shall now proceed to deal with the respondents' second cause of action: conspiracy with the first to fifth and eighth defendant to deprive the plaintiffs' of their rights to the said land. *When the claim is one of conspiracy then it falls under the emerging tort of conspiracy to do an act resulting in damage to the claimant. Being a tortuous claim,* s 6(1)(a) of the Act has this to say:
>
> Limitation of actions of contract and tort and certain other actions

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say actions founded on a contract or on tort;

Since this proposed action is brought after this period of six years, it would also fail in limine upon a plea of limitation under this provision of the ... (Emphasis added.)

[61] In the Court of Appeal case of *Lembaga Kumpulan Wang Simpanan Pekerja v Ong Lian Chee (suing as administrator of the estate of Goh Tin Poh, deceased)* [2010] 4 MLJ 762 at p 769, 'cause of action' has been defined as 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person':

[20] It is apposite to define the phrase *'cause of action'. It means 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person': per Diplock LJ in Letang v Cooper* [1964] 2 All ER 929 at p 934. See also *Lim Kean v Choo Koon* [1970] 1 MLJ 158, *Nasri v Mesah* [1971] 1 MLJ 32 (FC), *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301, *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (SC), and *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (SC), as found in Malaysian Court Practice 2007 Desk Ed LexisNexis at p 144. (Emphasis addded.)

[62] In the case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 at p 411, which was cited with approval by the Court of Appeal in *Lembaga Kumpulan Wang Simpanan*, Justice Hashim Yeop Sani, CJ Malaya, speaking for the Supreme Court, held that a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed:

Section 6(1)(a) of our Limitation Act 1953 (Revised 1981) provides, inter alia, that:

Save as hereinafter provided actions founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. (Note emphasis.)

That provision invites the question as to what is the date on which the cause of action accrued. In *Cook v Gill Brett J* defined 'a cause of action' to mean 'every fact which is material to be proved to entitle the plaintiff to succeed'. This definition was subsequently approved by the Court of Appeal in *Read v Brown* (1888) 22 QB 128. After reviewing the authorities Yong J in *Lim Kean v Choo Koon* [1970] 1 MLJ 158 came to the conclusion that the *period of limitation does not begin to run 'until there is a complete cause of action*'. In that case he held that the plaintiff's cause of action was not complete until an order is obtained from the Rent Assessment Board fixing the amount of the rent legally recoverable under the Control of Rent Ordinance. He accordingly held that the period of limitation commenced to run only from the date of the order of the Board.

From established authorities *we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and*

when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

And at pp 413–414 His Lordship, inter alia, state that the limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation and that the rationale of the limitation law should be appreciated and enforced by the courts:

The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

The limitation law is promulgated for the primary object of discouraging plaintiffs' from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. *The rationale of the limitation law should be appreciated and enforced by the courts.* (Emphasis added.)

[63] It is trite that a cause of action arises from the earliest possible moment in time when an action could be brought. This must be appreciated by the courts and parties alike: see our Federal Court decisions in *Nasri v Mesah* [1971] 1 MLJ 32 and in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749:

[12] In *Letang v Cooper* [1965] 1 QB 232, 242–3, Lord Diplock defined a 'cause of action' as 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another', which definition was adopted in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, where Abdul Hamid Ag LP, as he then was, appended that 'there must be a cause of action before a plaintiff can claim a relief in an action'. In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, 19, the Supreme Court per Salleh Abbas CJ, expounded that to make up 'a cause of action', first, the plaintiff has a right at law or by statue and secondly, the right has been affected by the act of the defendant:

> A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

...

In *Nasri v Mesah* [1971] 1 MLJ 32, the Federal Court per Gill FJ, as he then was, depicted 'a cause of action' as follows:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim;

A the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgement (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 131). In *Reeves v Butcher* (1891) 2 QB 590 511 Lindley LJ said: (sic)

Gill FJ, then thus enunciated on 'the date of accrual' in the case of a debt:

B This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 509 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. *The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.* (Emphasis added.)

C

[64] Further, we are in agreement with the defendants' contention that it is evident that when the first suit was filed, the cause of action for the second/present suit was already present. The plaintiffs alleged that they D returned to Malaysia on 25 February 2013 and filed their first suit on 9 June 2014 which is a year and three months after their arrival. The first suit thus was within the six years limitation period which expired on 4 July 2014. The second suit however, which was based on an identical claim on a tort of conspiracy was filed on 13 July 2017, about three years after the first suit was filed and nine E years from the date the cause of action arose. We are of the view that the facts pleaded in the second suit could have been pleaded in the first suit but this was not done. The delay in filing the second suit was not explained, leaving the impression that the plaintiffs were trying to re-litigate their first suit which was dismissed or were bringing their claims in instalments and thus caught under F the *Henderson v Henderson* extended or broader doctrine of res judicata. Further, as we have stated earlier, the plaintiffs return to Malaysia is not an element of the cause of action of a tort of conspiracy to intentional harm. Neither is it an act of the defendants'. Accordingly, the plaintiffs' alleged return to Malaysia on 25 February 2013 is irrelevant to the accrual of the cause of G action since the plaintiffs' purported return does not affect or postpone the accrual of the cause of action.

[65] The plaintiffs further submitted that the fact that the defendants had merely pleaded the defence of limitation does not mean that they are entitled, H as of right, to have the plaintiffs' claim struck off. The plaintiffs referred to the Federal Court case of *Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] MLJU 67; [2011] 3 CLJ 751 in support of their contention. Her Ladyship too, in the light of the plaintiffs' pleaded case under a continuing tort and the principle enunciated in *Tasja*, has made a finding that the issue of limitation should be I decided only after a full trial and not at the preliminary stage.

[66] It is our considered view that the case of *Tasja* stands for the proposition that in order to strike out on the basis of limitation, a defendant must first plead limitation in a defence. This the defendants had done. Once the defendants

had expressly pleaded the defence of limitation under s 6 of the Limitation Act 1953, the burden of proving that the action was brought within the limitation period lies with the plaintiff: see our Court of Appeal in *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445; [2017] 1 LNS 622 at [43] and [53]:

> [43] In law it was the duty of the respondents as plaintiffs' in the counterclaim to prove that the action was brought within the limitation period: see the decision of this court in *Sim Kiang Chiok v South East Asia Special Asset Management Bhd* [2016] 1 MLJ 57 where it was held as follows:
>
> > The use of the word 'shall' in the provision connotes its mandatory nature, which means the court has no discretion but to dismiss the action if limitation has set in. The rule is that once limitation is raised as a defence by the defendant, the burden of proving that the action was brought within the limitation period lies with the plaintiff.
>
> ...
>
> [53] As for the issue of limitation, it has been more than 12 years since the cause of action arose against Law Chin Wat when the respondents brought the counterclaim against him. Surely the respondents' action is out of time and barred by s 6(1) of the Limitation Act. The respondents cannot avail themselves of s 29 of the Limitation Act either as they failed to plead any of the circumstances falling under the express requirements of that provision. The learned judge should therefore have struck out the counterclaim against Law Chin Wat.

(See also the Court of Appeal case of *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504 and *Cartledge (Widow and Administratrix of The Estate of Fred Hector Cartledge (deceased)) and Others v E Jopling & Sons, Ltd* [1963] 1 All ER 341).

[67] The plaintiff has not addressed the issue of limitation in its pleading subsequent to the statement of claim as required by law and by O 18 r 8(1)(a) of the Rules of Court 2012.

> Any party shall in any pleading subsequent to a statement of claim plead specifically any matter ... (a) which he alleges makes any ... defence of the opposite party not maintainable.

[68] Therefore, from the matrix of the case, we are of the view that there was no cause of action based on a continuing tort since the plaintiffs, on their own admission, were able to return and had indeed returned to Malaysia several times in the year 2008 and 2009. Their first suit was filed a year and three months after their so called arrival on 25 February 2013. The second suit was filed nine years from the date their cause of action arose which is on 3 July 2008. Further, we are of the view that the causes of action of both the first and the second suit are one and the same, that of the tort of conspiracy to intentional harm and whatever facts that were pleaded in the second suit could

A have been pleaded in the first suit. Since the second suit was filed nine years from the date the cause of action arose, the plaintiffs were clearly out of time or barred under the s 6 of the Limitation Act 1953.

CONCLUSION

B

[69] Based on the reasons given above, we are of the view that:

(a) the doctrine of res judicata in its extended form applies. The bringing of this second/present suit is barred since it amounts to an abuse of the process of court; and

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(b) the claim is also barred by limitation under s 6 of the Limitation Act 1953 (Act 254).

In the circumstances, we thereby allowed the defendants' appeals with costs of RM4,000 (here and below) to each appellant, subject to the payment of allocator fees. The decision and order of the High Court dated 30 January 2018 is set aside. Deposits, if any, are to be refunded.

D

Notices of motion dismissed and appeals allowed with costs.

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Reported by Ahmad Ismail Illman Mohd Razali

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